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April 7, 2017

SUBJECT: Response to Public Notice – Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC, Petition for Declaratory Ruling WT Docket No. 16-421

The Texas Department of Transportation (“TxDOT”) is submitting comments concerning Mobilitie’s Petition for Declaratory Ruling. Although the Public Notice references comments towards the local governments, TxDOT is submitting comments to AASHTO from a state DOT perspective regarding its practices with permitting and leasing its ROW to utilities and others as well as its experience with small cell carriers.

TxDOT’s primary concerns allowing third parties in its ROW are 1) safety – e.g. maintaining an appropriate and uncongested clear zone, 2) expeditious delivery of transportation projects, such that any occupying entities do not cause delay and incur costs to future projects and 3) stewardship of public resources, such that TxDOT receives the appropriate compensation for the use of taxpayer resources.

TxDOT has broad authority to lease its real property assets, including but not limited to right of way, pursuant to the following: Transportation Code, §202.052, Title 43 Texas Administrative Code (43 TAC) §§21.600 to 21.606, and Title 23 Code of Federal Regulations (23 CFR) §§710.405 to 710.407. The property to be leased must be surplus to TxDOT’s needs for the term of the lease, and the consideration for the lease must be at least fair market value, as typically established by an appraisal. This is a different standard of value than is advocated by Mobilitie in its petition.

Transportation Code Sec. 202, Subchapter E (“Control of Transportation Assets; Telecommunication Facilities”) permits (but does not mandate) the potential leasing of state highway for the placement or sharing of telecommunication facilities of or by others on certain portions of the right of way, either under TxDOT’s general leasing authority (Sec. 202.052) or through an agreement under Sec. 202.093 (requiring a competitive sealed proposal process). Leasing and Agreements could involve compensation being paid to TxDOT, either in the form of cash or the shared use of the facilities.

Additionally, TxDOT has limited obligation to permit, for no cost, public utilities that also have a statutory right to occupy TxDOT right of way. TxDOT’s Utility Accommodation administrative rule, 43 TAC Section 21.31(40), recognizes this, as evidenced by its definition of “public utility” (“A person, firm, corporation, river authority, municipality, or other political subdivision that is engaged in the business of transporting or distributing a utility product that directly or indirectly serves the public and that is authorized by state law to operate, construct, and maintain its facilities over, under, across, on, or along highways”). Thus, a public utility’s ability to occupy public right of way exists only when it has been expressly authorized by the Legislature. Texas courts have strictly construed statutes authorizing corporations to place fixtures in public road right-of-way.

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TxDOT has recently seen a surge of (no-cost) utility permit requests from various wireless telecommunications infrastructure providers for the installation, within state highway right of way, of pole-mounted “small” cell antennae/transmitters and associated facilities. Recently, some entities have requested permits for relatively low powered units which receive and transmit wireless data mounted on poles with pole heights ranging from 30 feet up to 120 feet and site placements ranging from 500 feet to 2,000 feet from other telecom facilities.

These entities contend that they are “telephone corporation[s],” as defined by Utilities Code Section 181.081, and therefore have a clear and express statutory authority to occupy highway right of way by the reason of Utilities Code Sec. 181.082: “(a) telephone...corporation may install a facility of the corporation along, on, or across a public road, a public street, or public water in a manner which does not inconvenience the public in the use of the road, street, or water”.

Utilities Code Sec. 181.081 defines a “telephone corporation” in a vague, somewhat antiquated manner, as “a corporation created to construct and maintain telephone lines” (underlined emphasis added).

The requesting entities also claim to be public utilities by reason of having a Service Provider Certificate of Operating Authority (SPCOA”) issued by the Texas Public Utility Commission. However, as stated above, even if this certificate established these entities as “public utilities,” they would still need to claim a specific legislative authorization to occupy ROW.

Currently, TxDOT does not have a uniform program in place for handling requests by carriers of this type to occupy its ROW. Inconsistency in industry application status, safety siting requirements and priority of transportation project management have delayed establishment of a uniform program.

To the extent that Mobilitie’s petition seeks to change the standard of value for the use of TxDOT ROW from “fair market value” to only represent those costs related to issuing permits and managing rights of way, that finding would be in contravention of State law.

Sincerely,

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